In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE SAC AND FOX INDIANS OF THE Mississippi in Iowa, Appellants,
v.
THE SAC AND FOX INDIANS OF THE Mississippi in Oklahoma and the United States.
No. 614.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted by the Sac and Fox Indians of Iowa, under a special act of Congress, against the Sac and Fox Indians of Oklahoma for the recovery of certain annuities and moneys derived from the sale of lands, amounting to $454,215.80, which, as they allege, properly belonged to them, but were illegally diverted by the United States and paid to the defendant Indians.

The jurisdictional act is set forth in the findings of the court below. (Rec., p. 34.)

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There is a tradition current in the tribe that the Sac Indians, sometimes spelled Sock and sometimes Sauk, came originally from New England, and were driven westward by the English during the period of King Phillip's war.

The Sac Indians appear to have formed a union at some unknown date with the Foxes from the Great Lakes, for, on November 3, 1804, a treaty was made "between the United States of America and the united tribes of Sac and Fox Indians" (7 Stat., 84–87), by which the Indians ceded all of their territory along the Mississippi River in what is now the States of Illinois and Iowa to the United States and fixed the boundary of the two tribes farther west in what is now the State of Iowa, the consideration being goods to the value of $2,200 and a perpetual annuity in "goods suited to the circumstances of the Indians of the value of one thousand dollars (six hundred of which are intended for the Sacs and four hundred for the Foxes)."

The defendant Indians acquired their distinctive title of the "Sac and Fox Indians of the Mississippi" from the treaty of September 13, 1815 (7 Stat., 134, 135), entered into with a portion of the Sac and Fox tribes which refused to go to war with the United States, and moved to the Missouri River, and were afterwards known as the "Sac and Fox Indians of the Missouri" to distinguish them from the defendant Indians, who have since been known as the "Sac and Fox Indians of the Mississippi."

On October 21, 1837, the United States entered into a treaty with the defendant Indians (7 Stat., 540–542), by article 1 of which the said Indians ceded to the United States a part of the lands in Iowa, containing 1,250,000 acres, lying west and adjoining the tract conveyed by the treaty of September 21, 1832.

Article 2 provided among other things that the sum of $10,000 should be paid them annually, in the manner annuities are paid, at such time and place and in money or goods as the tribe may direct, provided that it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education, or other purposes calculated to improve their condition.

On October 11, 1842, the United States entered into a treaty with the defendant Indians, the Sac and Fox tribe of the Mississippi (7 Stat., 596–600), by article 1 of which the Indians ceded all their lands in the State of Iowa to the United States, reserving the right to occupy, for the term of three years from the signing of the treaty, a portion of the ceded lands therein described.

In consideration of the cession of the lands in Iowa, it was provided in article 2 of said treaty that the United States should pay to the Sac and Fox Indians annually the sum of $40,000, and in addition thereto should pay their debts, amounting to the sum of $258,566.34. This article also provided that the President should, as soon after the ratification of the treaty as was convenient, assign a tract of land on the Missouri or its tributaries suitable and

convenient for Indian purposes to the Sac and Fox Indians for a permanent and perpetual residence for them and their descendants.

Article 4 of the treaty provided that each of the principal chiefs of the Sacs and Foxes should thereafter receive the sum of $500 annually out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.

Article 5 provided for the retention of $30,000 from each annual payment in the hands of the agent of the tribe, to be expended for national and charitable purposes among their people.

In pursuance of article 2 of the treaty of October 11, 1842, by order of the President, a reservation was assigned in the territory which afterwards became a part of the State of Kansas, to the defendant Indians for a permanent residence, and they were practically all removed to that reservation by the fall of 1846, where they all resided together, receiving their annuities each year *per capita* until the year 1855.

In the year 1855 certain members of the Sac and Fox Indians left their reservation in Kansas without permission of the agent or other United States official and proceeded to their old reservation in the State of Iowa, and after wandering around the State for some time settled in Tama County.

From 1862 to 1866 other members of the tribe left their reservation in Kansas without permission of the United States authorities and joined those already in

Iowa. The number of Indians, their names, ages, and sex, who left their reservation in Kansas between 1854 and 1866 have not been established by competent evidence. (Rec., p. 35.)

On July 15, 1856, an act was passed by the legislature of Iowa granting the consent of the State permitting the Sac and Fox Indians then residing in Tama County to remain in the State, and requesting the governor to inform the Secretary of War of its action and to urge upon the department the propriety of paying said Indians their proportion of the annuities due or to become due to the tribe of Sac and Fox Indians.

By section 2 of the act the sheriff of Tama County was directed to take the census of the Indians then residing there, giving the name and sex of each, a list of whom should be recorded in the county court; and those persons and none others were to have the privileges granted by the act.

After the passage of this act the claimant Indians purchased with their own funds lands in Tama County, which they have resided on and cultivated ever since. The number, names, ages, and sex of Indians embraced within the act of the Iowa legislature have not been shown by competent evidence. (Rec., p. 36.)

From 1855 to 1866 there was no agent or other government official with the Iowa band of Indians, and they do not appear to have been recognized by the United States during that period. The fact that some of the Sac and Fox Indians had left their res-

ervation in Kansas appears to have been known to the Government at the time of the treaty of 1859, to which we shall later refer. The special agent, Leander Clark, took a census of the Indians in Iowa in 1866, which showed their total number at that time to be 264 persons; and he appears to have expended for them the sum of $5,359.06 for goods and traveling expenses, and on account of annuities for the year 1865. With this exception all of the annuities and other moneys belonging to the Sac and Fox Indians from 1855 to 1866 were paid to or expended for the Indians by the agents and superintendents at the Sac and Fox Agency, Kans. (Rec., pp. 36, 37.)

The Sac and Fox Indians who left Kansas in 1862 and afterwards went to Iowa received their shares of the annuities at the last payments before they left. Whether or not any of them ever returned to Kansas and received their annuities at the agency has not been shown by competent evidence. (Rec., pp. 36, 37.)

On October 1, 1859, the United States entered into a treaty with the confederated tribes of Sacs and Foxes of the Mississippi at the Sac and Fox Agency, in the Territory of Kansas (15 Stat., 467–471), by which it was provided that a reservation of 153,600 acres of land should be set apart for allotment in severalty (arts. 1, 2, 3, and 4), and the surplus lands of the reservation should be sold to pay the debts of the confederated tribes of Sacs and Foxes, or the individual members thereof (art. 5).

Article 6 of the treaty provided that if the proceeds of the sale of their surplus lands should be insufficient to carry out the purposes and stipulations of the agreement, such additional means as might be necessary therefor should be taken from the moneys due them under the provisions of former treaties. The treaty also provided that in order to render unnecessary any further agreements with the United States, "It is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interest."

Article 7 recited the fact that the Sacs and Foxes of the Mississippi were anxious that all members of the tribe should participate in the advantages of the treaty, and to that end invited all who were separated to rejoin and reunite with them, and it was agreed that the Commissioner of Indian Affairs, as soon as practicable, should have the nonresident members of the tribe notified of the advantages of the treaty in order to induce them to come in and unite with their brethren;

> and to enable them to do so and to sustain themselves for a reasonable time thereafter such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and perma-

> nently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations.

By a clause in the Indian appropriation act of March 2, 1867 (14 Stat., 507), Congress for the first time recognized the right of the Iowa Indians to participate in the annuities of the Sac and Fox tribe by the following language:

> For interest on eight hundred thousand dollars, at five per centum, per second article, treaty eleventh October, eighteen hundred and forty-two, forty thousand dollars: *Provided*, That the band of Sacs and Foxes of the Mississippi now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

On February 18, 1867, the United States entered into a treaty with the tribe of Sac and Fox Indians of the Mississippi, which was proclaimed October 14, 1868 (15 Stat., 495–504), by which the Indians ceded to the United States all of their lands in the Territory of Kansas, and agreed to their removal to a reservation south of the lands of the Cherokees in the Indian Territory, now the State of Oklahoma. The total lands ceded aggregated 147,393.32 acres, for which the United States agreed to pay at the rate of $1 per acre, and made appropriation for payment of the same by the act of April 10, 1869 (16 Stat., 35).

By the ninth article of the treaty of 1867, as amended by the Senate, it was provided that the sum of $10,000 should be paid for the erection of necessary school buildings and dwelling for the teacher, and $5,000 should be set apart from the income of their funds, after the erection of such school buildings, for the support of the school. After the settlement of the tribe upon their new reservation, the sum of $5,000 of the income of their funds might be annually used, under the direction of the chiefs, in support of their national government, "out of which last-mentioned amount the sum of $500 shall be annually paid to each of the chiefs" (pp. 500 and 501).

By the tenth article of the treaty of 1867, the United States agreed "to pay annually, for five years after the removal of the tribe, the sum of $1,500 for the support of a physician and purchase of medicines, and also the sum of $350 annually for the same time, in order that the tribe may provide itself with tobacco and salt."

By article 21, which was inserted by the Senate as an additional article, the Sacs and Foxes of the Mississippi, parties to the agreement, expressed their desire that all of the tribe should participate in the advantages to be derived from the investment of their national funds and sales of their lands, and agreed that as soon as practicable the Commissioner of Indian Affairs should cause the necessary proceedings to be adopted to have the absent members of the tribe notified of the treaty and its advantages, and

to induce them to come and permanently unite with their brethren; and—

> That no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties now due or to become due said nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency on their lands as then located.

The first payment to the Sac and Fox Indians in Iowa under the treaty of 1867 was made in the early part of that year in the sum of $11,174.66, and payments at that rate were made up to and including the fiscal year 1884. The numbers upon which the annuities were apportioned by the Secretary of the Interior during this period are not shown, and there does not appear to have been any fixed numbers adopted and used as a basis for such apportionment. The claimant Indians protested that the amount apportioned was not their pro rate share according to numbers and refused to accept payment until Congress, by a clause in the Indian appropriation act of May 17, 1882 (22 Stat., 78), provided:

> That the sum of one thousand five hundred dollars of this amount shall be used for the pay

> of a physician and for purchase of medicine; in all, fifty-one thousand dollars: *And provided further*, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them.

They then consented to receive their share apportioned to them by the Secretary of the Interior. (Rec., p. 38.)

By the act of July 4, 1884 (23 Stat., 85), Congress provided:

> That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior.

In pursuance of the requirements of this act the census of the Sac and Fox Indians in Iowa was taken under the direction and supervision of the Secretary of the Interior, and it was ascertained that there were at that time residing in Iowa 317 original Sac and Fox Indians. He also caused a census of the Sac and Fox Indians on the reservation in Oklahoma to be taken, and found that there were 505 Indians in 1884 and 513 in 1887 on said reservation. Since

that time the numbers 317 for the claimant and 513 for the defendant Indians have been used and adopted as a basis of apportionment of annuities of said tribes between the two branches, except for the years 1885 and 1886, when the number employed as a basis was 505. (Rec., pp. 38, 39.)

In apportioning the sum of $51,000 appropriated by Congress annually for the Sac and Fox Indians of the Mississippi, $1,000 under the treaty of 1804, *supra;* $10,000 under the treaty of 1837, *supra;* and $40,000 under the treaty of 1842, *supra*, the Government has from 1885 to the date of the filing of the petition herein first deducted from said $51,000 the sum of $11,500 provided for by the ninth and tenth articles of the treaty of 1867 and expended the same for the exclusive benefit of the Oklahoma branch. The remainder has been apportioned between the two branches of the tribe on the basis of 317 for the appellant and 513 for the defendant Indians. These numbers have been used as a basis of apportionment from 1884 to 1907, excepting for the years 1885 and 1886, when 505 was used as the basis for the defendant Indians.

The competent evidence presented to the court does not show what increase, if any, or what decrease, if any, there has been in the numbers of the two branches of the tribe during that period. (Rec., p. 39.)

The $1,500 referred to by the Court of Claims in its twelfth finding (Rec., p. 39) is embraced in the $11,500 referred to in the eleventh finding.

By the act of May 31, 1900 (31 Stat., 245), the Secretary of the Interior was directed—

> to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year nineteen hundred, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three.

The Iowa Indians presented to the Fifty-third Congress three claims:

1. For their proportionate share of the tribal annuities from 1853 to 1866, both inclusive, amounting to	$143,745.80
2. For their just proportionate shares of the tribal annuities for the period from 1867 to 1894, inclusive, including their proportionate share of $5,000 for manual labor school and $5,000 for support of national government of the tribe, and of the amount used for physicians and medicines, aggregating	157,183.45
3. Their proportion of the appropriation of $147,393.32 for lands ceded by the treaty of 1867, amounting to $50,302.84, with interest at 5 per cent from 1873, amounting to	57,848.27

By the act of March 2, 1895 (28 Stat., 876–903), these claims were referred by Congress to the Secretary of the Interior for investigation and report, and he was directed to—

> ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources, and if so, how much, giving full opportunity to all

parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof.

In pursuance of the requirements of this act the Secretary of the Interior thoroughly investigated the claims in question, and found:

As to the first claim that nothing was due, as the same had been forfeited in consequence of the abandonment of the reservation by the Indians in defiance of treaty obligations and without the consent of the Government.

As to the second claim he found that nothing was due from the annuities paid to the Oklahoma Indians from 1867 to 1894, as the same had been properly and justly apportioned and paid in accordance with the provisions of the treaties and acts of Congress.

As to the third claim, for their proportionate share of the appropriation for the lands ceded under the treaty of 1867, he found that there was due them the sum of $29,184.38 on account of principal and $32,832.45 interest thereon at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating $62,016.83, from which was deducted $19,123.58, already paid to said Indians on account of said claim, leaving a balance of $42,893.25, which was reported to Congress by the Secretary of the Interior on March 12, 1896, as due to said Indians, and was afterwards transferred by Congress on the books of the Treasury Department from the funds of the defendant Indians to the credit of the claimants. (Rec., pp. 39, 40.)

Appellants claim in the court below:

1. A pro rata share, according to numbers, of the annuities from 1855 to 1866, inclusive	$125,647.96
2. Balance due them of their pro rata share, according to numbers, of the annuities from 1867 to 1899, inclusive	225,355.95
3. Balance due them of their pro rata share, according to numbers, of the annuities from 1900 to 1907, inclusive	25,788.85
4. Annuities due the chiefs of the Foxes in Iowa from 1862 to 1899	18,500.00
5. Their pro rata share, according to numbers, of the proceeds received from the disposal of land under the treaty of 1859	58,923.04
Total	454,215.80

Items 4 and 5 were not presented to the Fifty-third Congress nor referred by Congress to the Secretary of the Interior for consideration under the act of March 2, 1895, *supra*.

On April 6, 7, and 8, 1909, the case was argued in the Court of Claims, and on May 20, 1909, the court filed findings of fact and conclusion of law, dismissing the petition.

On June 9, 1909, the claimants, appellants here, filed a motion for a new trial, which was argued and submitted on January 10, 1910. On March 21, 1910, the claimants' motion was allowed in part and overruled in part, but the judgment was allowed to stand.

Points raised in defense.

1. Congress by the jurisdictional act never intended to render the United States liable to the appellants on this claim or any part of it, but simply allowed the Government to be joined as a party defendant because it holds the tribal funds in trust.

2. There is no liability against anyone on the first item of the claim, because the individual Indians who deserted their reservation without permission of the Government forfeited their annuities. *Second*, because there is no competent evidence of the number or identity of said individuals, and, *third*, because Congress has ratified the payment of the annuities to the tribe.

3. There is no liability on items Nos. 2 and 3, because the annuities were properly paid to the tribe and the payments ratified by Congress.

4. There is no liability on item 4 because the act which for the first time gave an annuity to a Fox chief in Iowa was, according to its terms, prospective, and did not provide for the collection of back annuities.

5. There is no liability on the fifth item of the claim, first, because there is no competent testimony as to the identity and number of the members of the tribe who left their reservation in Kansas and went to Iowa. *Second*, because there is no evidence to show that all of such Indians did not return in accordance with the treaty of 1859, and have their debts paid. *Third*, because none of the money derived from the sale of land under the treaty of 1869 was paid into the Treasury to be held in trust for the tribe, all of the proceeds having been used in the payment of the debts of the Indians.

ARGUMENT.

The competent evidence is embraced in the findings of fact. (Rec., pp. 34 to 40, inclusive.)

The testimony submitted in this case by the appellants in the court below consisted of nine affidavits, a number of letters, and reports of the Interior Department and committees of Congress, and the question of their admissibility as evidence was thoroughly considered during the four days' argument of the case, and finally rejected by the court of claims as incompetent.

Appellants contended that the affidavits were competent evidence because they were contained in a report to Congress and embodied in an executive document, and that under the language used in the jurisdictional act the reports and affidavits became evidence. The language used is as follows:

> The reports made to Congress on any of said claims by any department of the Government and printed as congressional documents shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them.

Mr. Belt, who was the attorney for the appellants in the court below, for a number of years, while these claims were pending in the Department of the Interior, was Assistant Commissioner of Indian Affairs, and admitted during the trial of the case that most, if not all, of the reports of committees of Congress had been prepared by himself.

The character of testimony submitted by the appellants appears to have been in the mind of Mr. Platt, of Connecticut, chairman of the Committee on Indian Affairs of the Senate, in speaking of this class of cases, to which we refer upon the authority of the case of *Binns* v. *The United States* (194 U. S., 486–496):

> I do not speak of this claim, but of claims against the Government, and I speak more especially now with regard to what are known as Indian claims. These claims are worked up by attorneys, who, I fear, with the aid of people in the departments who have knowledge of Indian affairs and of treaties, come to the conclusion that possibly they may get something through the Court of Claims in favor of an Indian tribe. So they work up claims which the Indian tribes very often have never heard of, get a contract of 5, 10, and 15 per cent, and then come to Congress and ask that the claim may be referred to the Court of Claims for adjudication.
>
> That is a very plausible request to make, and the Senate has very little time to consider whether it is a claim which is really of consequence enough and which has enough behind it to send it to the Court of Claims. So the matter goes upon request. Then an *ex parte* statement, which has been carefully and skillfully prepared by the attorneys, is submitted to the Court of Claims. (57th Cong., 1st sess., vol. 35, pt. 6, pp. 6261–6262.)

The court below refused to incorporate the incompetent matter submitted and gave its reasons very clearly in the following language:

> In the case at bar it was stipulated by and between the attorneys for the claimant and defendant Indians that certain affidavits of the Iowa band might be read as evidence in the trial of this cause, but the United States, who are a party to the suit, by their attorney, refused to sign said stipulation, and are therefore not bound by it. But even if all the parties to the suit had agreed to the proposed stipulation, the court would not be bound thereby. Counsel can not, by stipulation or otherwise, require a court to admit testimony which, under legal rules, is not admissible as evidence in a case. Hence said *ex parte* affidavits, even though they may be printed in the report of a congressional committee, can not properly be admitted as testimony in this litigation. (Rec., p. 43.)

The Court of Claims followed the rule laid down in *Jones and Laughlins* v. *The United States* (42 C. Cls., 178), where it said, at page 184:

> The stipulation can not be admitted so as to dispense with proof which the court deems material. *Ex parte* affidavits relating to matters more properly appearing by deposition can not be substituted despite the stipulation.

The attorneys for the defendant Indians stipulated that the affidavits might be used as evidence. (Rec., p. 87.) In fact, they offered two affidavits themselves which were not considered by the Court of Claims. (Rec., pp. 63, 64, 65, 67, 68, 69.) The attorney who represented the United States, on the other hand, refused to agree to the consideration of

any of the affidavits, and protested against the incompetent matter being incorporated in the transcript of record in this case, upon the ground that the court below had the right to determine what *was* and what *was not* evidence. The Court of Claims, however, included the whole record in the transcript. (Rec., pp. 48, 49.)

In the case of the *Sisseton and Wahpeton Indians* v. *The United States* (208 U. S., 561), a case similar to this, where an accounting was prayed, the attorneys for the Indians attempted to use several public documents which had been submitted to the Court of Claims, and which that court had refused to incorporate in its findings. This court, through Mr. Justice Holmes, said, at page 566:

> We may add here that, as we do not go behind the findings of fact (*McClure* v. *United States*, 116 U. S., 145; *District of Columbia* v. *Barnes*, 197 U. S., 146, 150), there has been some waste of energy in arguing from public documents of which we are asked to take notice, and that we see no reason to revise the finding that the claimants should be charged with half the total payments of which their share is to be set off.

The appellants contend that if the defendant Indians are not liable in this action, then the Government is responsible for an improper diversion of the funds, while the defendant Indians claim that if the appellants are entitled to recover the recovery should be against the United States. The United States, therefore, is interested in the defense of this

suit and entitled to object to any incompetent, irrelevant, immaterial, or inadmissible testimony offered at the trial thereof.

The appellants have almost entirely ignored the findings of the Court of Claims and obtained their alleged facts from incompetent matter rejected by that court. It would not be absolutely correct to say that they have totally ignored the findings of fact of the lower court, for in several instances they have attacked the reliability of those findings.

Construction of the jurisdictional act.

The jurisdictional act waived the statute of limitations and gave to the court of claims full legal and equitable jurisdiction to hear, determine, and render judgment in "all claims of the Sac and Fox Indians of the Mississippi in Iowa against the Sac and Fox Indians of the Mississippi in Oklahoma and the United States for money claimed to be due them," etc. The United States has been made a party to the suit, not because Congress intended to create any liability against the Government, but in order to comply with the legal requirement that where a suit is brought against a *cestui que trust* the trustee must be joined as one of the parties defendant. The suit in this case relates entirely to the apportionment of the trust fund in the United States Treasury belonging to the Sac and Fox Indians.

In none of their numerous claims has the Iowa branch of the tribe ever alleged fraud in the official acts of the Secretary of the Interior, or that the money

claimed was due them by the United States. Their claim has always been that they, as well as the defendant Indians, were wards of the Government, but that the Government has paid to the defendant Indians more than their *pro rata share* of the tribal funds. This is illustrated by the action of Congress in the payment of the award of $42,893.25 made by the Secretary of the Interior under the act of March 2, 1895, *supra*, where it was transferred upon the books of the Treasury Department from the tribal funds to the credit of the defendant Indians to the credit of the appellants. (Rec., p. 40.)

The fact that Congress never intended in any event to charge the Government with any part of this claim is clearly shown by House bill 10133, Twenty-ninth Congress, first session, which passed Congress and was vetoed by the President, upon whose recommendation the claim was afterwards referred to the Court of Claims, and which provided that $100,167.10 should be taken from the fund to the credit of the Sac and Fox Indians of the Mississippi in Oklahoma and transferred to the credit of the Iowa Indians. This bill is not evidence for any purpose, as it was vetoed by the President and rejected by the Court of Claims in its findings; but as the appellants have referred to it in their brief, we believe we are justified in calling the court's attention to this provision.

The appellants have taken the position that the jurisdictional act has given them rights which they did not already possess, and that no defenses can be

made questioning the justice or equity of their claim. To this we reply that Congress, in the jurisdictional act, did not assume to pass upon the justice or the legality of the claims in favor of either party, but simply referred the claims to the Court of Claims for a judicial determination, where any defense, legal or equitable, might be interposed, except the bar of the statute of limitations, which was expressly removed. Nothing is said in the act that would prevent the defendants from setting up the plea of *res judicata* to these claims, upon the ground that they were once presented to a tribunal which had passed upon them, rejecting some and making an allowance upon one for over $42,000, which was afterwards paid and accepted by the claimants.

The appellants have also taken the position that in view of the language used in the jurisdictional act the court shall consider as conclusive evidence affidavits, letters, and public documents. It is, however, a well settled rule of law that legislatures have no power to determine the weight which shall be given to evidence by courts of law, otherwise they could determine in advance all cases, and this fact was recognized by Congress in the act in question. In this case, while there were many important facts to be established by the claimants, no evidence has been taken under the rules of court. The appellants have relied entirely on affidavits which were embodied in some congressional committee report, evidently under the mistaken impression that be-

cause permission was given to the Court of Claims to consider reports made to Congress, it could also consider affidavits which were made a part of such reports. Such an interpretation of the law is obnoxious to the elementary rules of evidence, and until the material facts are established by competent and sufficient evidence it is impossible to adjudicate the questions involved in the case.

Appellants contend that reference of their claim to the Court of Claims fixed their status or gave them a standing which they did not already possess. The learned justice who delivered the opinion of the court in the case of *Stewart* v. *The United States* (206 U. S., 185) said:

> The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.* (Italics ours.)

The Court of Claims was clearly of the opinion that in no event could the United States be held liable to reimburse the appellants out of the Treasury. The court said (Rec., p. 42):

> The United States have been made a party to the suit in order to comply with the legal requirement that where a suit is brought against a *cestui que trust* the trustee must be joined as one of the defendants, or where a suit is brought against a ward the guardian

must also be made a party. It does not appear that in all of their numerous claims the claimant Indians have anywhere charged fraud in the official acts of the Interior Department, or that the money claimed was due them by the United States. Their contention is that they, as well as the defendant Indians, were wards of the Government, and that its agents had paid to the defendant Indians more than their proper share of certain specified funds due under various treaties between said defendant Indians and the United States. The fact that both Congress and the Indian Office have sought to deal fairly with both branches of this tribe is shown by the claim set out in Senate Document No. 167, Fifty-fourth Congress, first session, wherein the Secretary of the Interior was directed to investigate certain claims of the Iowa band and report his findings thereon. This was done, as set forth in Finding XIII, and the report showed $42,893.23 to be due from the defendant tribe to the claimant tribe, which amount was promptly allowed by Congress and was passed to the credit of the Iowa band on the books of the Interior Department.

The court below held that the claim as it stood before reference to the Court of Claims had not been changed in any respect by the jurisdictional act, which simply gave claimant Indians a forum in which to maintain such rights as they may possess (*Stewart* v. *United States*, 206 U. S., 185).

The award of the Secretary of the Interior under the act of March 2, 1895 (28 Stat., 903).

The Secretary of the Interior investigated the claims referred by Congress and found—

As to the first claim, that nothing was due, as the right to payment had been forfeited by the Sac and Fox Indians in Iowa as a result of the abandonment of their reservation in Kansas without the consent of the Government and in defiance of treaty obligations.

As to the second claim, he found that there was nothing due from the annuities paid to the Oklahoma Indians from 1867 to 1894, as the same had been properly and justly apportioned and paid in accordance with the provisions of the treaties and acts of Congress.

As to the third claim, for their proportionate share of the appropriation for the lands ceded under the treaty of 1867, he found that there was due them the sum of $29,184.38 on account of principal and $32,832.45 interest thereon at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating $62,016.83, from which was deducted $19,123.58, already paid to said Indians on account of said claim, leaving a balance of $42,893.25, which was reported to Congress by the Secretary of the Interior on March 12, 1896, as due to said Indians and was afterwards transferred by Congress on the books of the Treasury Department from the funds of the defendant Indians to the credit of the claimants. (Rec., p. 40.)

Item 4 of the present claim, $18,500 for annuities due to the chiefs of the Foxes in Iowa from 1862 to 1899, and item 5, for their pro rata share, according to numbers, of the proceeds received from the sale of land under the treaty of 1859, $58,923.04, were not presented to the Fifty-third Congress nor referred by it to the Secretary of the Interior under the act of March 2, 1895, *supra*.

It would therefore appear that all of these claims come within the well-established rule that where a party has presented his claim to a special tribunal and has accepted the amount awarded, he thereby acquiesces in the decision of the tribunal by which a part of his claim is rejected, as well as the finding in his favor. (*United States* v. *Adams*, 7 Wall., 463; *United States* v. *Adams*, 9 Wall., 554; *United States* v. *Child*, 12 Wall., 232.)

In the case of the *United States* v. *Clyde* (13 Wall., 35), which followed the decision of the *United States* v. *Child*, *supra*, the court said:

> The Government stood on the order of a superior officer and insisted that this should govern the contract; the claimant insisted the contrary. Under these circumstances the final determination of the latter to take the balance of the account as made out upon the basis contended for by the Government and his giving a receipt in full is clear evidence that he agreed to take that balance in satisfaction of the claim; and this fact, under the circumstances of the case, precludes him from making any further demand.

Whether tribal Indians who have no forum for the settlement of claims until granted by Congress are governed by the rules of law laid down for persons who are sui juris is of course to be considered in this connection. However, in the case of the *United States* v. *The Cherokee Nation* (202 U. S., 101) this court held the Government liable to the Cherokee Nation for the amount stated in the Slade and Bender account, made under the agreement of December 19, 1891, ratified by section 10 of the act of March 3, 1893 (27 Stat., 640).

The plenary power of Congress over Indian tribes.

The Sac and Fox Indians are and always have been tribal Indians residing on reservations set apart for them by the Government.

The Government of the United States, acting through its legislative branch, is the guardian of all the Indians within its limits so long as the tribal relations continue. (*Worcester* v. *Georgia*, 6 Pet., 515; *Elk* v. *Wilkins*, 112 U. S., 96; *United States* v. *Kagama*, 118 U. S., 375; *Choctaw Nation* v. *United States*, 119 U. S., 1; *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U. S., 641; *Talton* v. *Mayes*, 163 U. S., 376; *Roff* v. *Burney*, 168 U. S., 218; *Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Jones* v. *Meehan*, 175 U. S., 1; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *United States* v. *Rickert*, 188 U. S., 432; *United States* v. *Winans*, 73 Fed. R., 72; *Winters* v. *United States*, 207 U. S., 564.)

In the case of the *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), the court, referring to the case of *Stephens* v. *Cherokee Nation* (*supra*), said:

> The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed.

And the opinion closes with the broad statement that—

> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, *the manner of its exercise* is a question within the province of the legislative branch to determine, and is not one for the courts. (Italics ours.)

The case of the *Cherokee Nation* v. *Hitchcock* followed the way clearly marked out by earlier decisions of this court. In the case of *Elk* v. *Wilkins* (*supra*) the court said:

> But the question whether any Indian tribes, or members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, *and not by each Indian for himself*. (Italics ours.)

In the very important and far-reaching decision in the case of *Lone Wolf* v. *Hitchcock* (*supra*), decided

one month after the case of the *Cherokee Nation* v. *Hitchcock*, this court said:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, *not subject to be controlled by the judicial department of the Government*. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, *a moral obligation* rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (*Chinese Exclusion case*, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (Italics ours.)

It will be observed that the act of Congress, the validity of which was in question in the Lone Wolf case, provided, in violation of existing treaties with the Indians, by direct legislation for the allotment of their lands, the sale of their surplus lands, and the disposition of the proceeds of such sales, upon the theory that they were wards of the United States. In concluding its opinion the court, upon the authority of *Stephens* v. *Cherokee Nation* (*supra*), used language which would appear to indicate that there is no limit to the plenary power of Congress over Indian tribes and their property, and the courts of law have no jurisdiction to interfere with its exercise.

> We must presume that Congress acted in perfect good faith in the dealing with the

> Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Individual members of the tribe have no vested interest in tribal funds.

All of the lands belonging to the Sac and Fox Indians of the Mississippi, whether in Oklahoma or the State of Iowa, are tribal funds held by the United States for the benefit of the tribe.

The appellants in this case contend that their proportion of the annuities and other tribal funds is a vested right of which they can not be deprived under the fifth amendment to the Constitution of the United States, which provides that "no person shall be deprived of life, liberty, or property without due process of law." They do not appear to have taken into consideration the difference in status between tribal Indians and persons who are *sui juris*, and that different rights of property obtain when considering legislation relating to the Indian wards of the Government.

In the case of *Stephens* v. *The Cherokee Nation* (174 U. S., 445), where certain applicants in the Cherokee Nation had been finally denied citizenship, and in the other nations admitted to citizenship under the act of June 10, 1896, this court said:

> The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship, is placed by the judgment of a lower court beyond the power of reorganization by a higher court, though subsequently authorized by general law to exercise jurisdiction.

And it was further held in the same opinion:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involved a contradiction in terms.

In the case of *Wallace* v. *Adams* (143 Fed. Rep., 716) the defendant was admitted to citizenship in the Choctaw Nation by the United States court under the act of June 10, 1896, and by the Supreme Court upon appeal. The Atoka agreement providing for the allotment of lands of the Choctaw and Chickasaw nations, entered into April 23, 1907, was ratified by Congress June 28, 1898 (30 Stat., 495). Practically

the only contention of the defendant was that he had been finally enrolled as a citizen of the Choctaw Nation; that he had taken possession of and improved a farm upon the public domain, *and that his right to the land became vested when the allotment agreement was ratified by Congress June 28, 1898.*

On the question of vested rights the court said:

> But *none of the authorities* cited contains a decision that one has a *vested right* in the judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property.

This court upon appeal (204 U. S., 415) sustained the decision of the Circuit Court of Appeals and quoted at length with approval its former decision in the Stephens case, *supra* (*Roff* v. *Burney,* 168 U. S., 218).

Citizenship of Indians does not change status of tribal property.

The Sac and Fox Indians of the Mississippi in the Indian Territory were tribal Indians, without any of the rights of citizenship, until the act of March 3, 1901 (31 Stat., 1447), amending the act of February 8, 1887 (24 Stat., 390), provided that—

> Every Indian in the Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens.

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The Sac and Fox Indians of the Mississippi in Iowa always have been and still are tribal Indians, without any of the rights of citizenship.

The citizenship of the Sac and Fox Indians in Oklahoma since March 3, 1901, is immaterial, for so long as their tribal relations continue the power of the Government over the disposition of the tribal property remains unaffected.

In the case of *Farrell* v. *The United States* (110 Fed. Rep., 942) the court said:

> It is the settled rule of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. (*United States* v. *Holliday*, 3 Wall., 407; *United States* v. *Earl*, 17 Fed. Rep., 75, 78.)

In the case of *United States* v. *Rickert* (188 U. S., 432) the court used the following language:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political question which the courts may not determine.

In the case of the *Cherokee Nation* v. *Hitchcock* (187 U. S., 294) the court said:

> There is no question in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898 has relation merely to the control and development of the tribal property *which still remained subject to the administrative control of the Government, even though the members of the tribe had been invested with the status of citizenship under recent legislation.* (Italics ours.)

Item 1 of the claim.

The first item of the claim made by the Sac and Fox Indians of Iowa is for their pro rata share, according to numbers, of the annuities of the Sac and Fox tribe of the Mississippi from 1855 to 1866, inclusive.

The Sac and Fox Indians of the Mississippi, as already set out in the statement of the case, were removed from Iowa in 1845 and 1846, under the treaty of 1842, to the Territory of Kansas, and remained there drawing their annuities until the early part of the year 1855, when certain members of the tribe, their number, ages, and sex not shown by competent evidence, deserted their reservation and, without authority from the agent or any other government official, returned to their old reservation in Iowa and finally settled in Tama County upon 3,000 acres of land purchased with the annuities which they had already received. The following year the legislature of Iowa passed an act granting permission to those who had returned up to that time to remain

in the State as long as they continued peaceful. The sheriff of the county was directed to take a census of the Indians, which does not appear to have been done.

In 1862 other members of the band deserted their reservation in Kansas, without permission of the agent or any other United States official, and joined those members of the tribe already in Iowa, and from that time until 1867, at various times, other members of the tribe returned to Iowa under the same circumstances.

There is no competent evidence to establish the number of Indians who left the reservation in Kansas and returned to Iowa from 1854 to 1867, nor as to their names, sex, and ages. (Rec., p. 35.)

Without doubt all of those members of the tribe who left Kansas and returned to Iowa received their shares of the annuities at the last payments made before they left. Whether any of them ever returned to Kansas and received their annuities with the tribe is not shown by competent evidence (Rec., p. 37), but from general knowledge of the wandering propensities of Indians it may be presumed that many of them did, for one of the Iowa Indians, Blackfeather, as late as 1895, was sent to the penitentiary for presenting for enrollment a child already enrolled among the Sac and Fox Indians of Oklahoma, and for obtaining its annuity for two years (Report of Commissioner of Indian Affairs, 1898, p. 167). The court, in its opinion, however, says:

> It is not shown how many of these Indians returned to Kansas during that period to receive their annuities, nor are their names given; but it does appear that some of them did return for that purpose. (Rec., p. 413.)

In order to protect the settlers around the Indian reservations, and for that matter to protect the Indians themselves, it has always been, up to the last few years, the custom and policy of the Government not to pay to or reserve annuities for Indians who were absent from the reservations without permission. A practice, the wisdom of which can not be questioned. (Rec., p. 43.)

During the whole period from 1855 to 1866 there was no agent with the members of the tribe in Iowa, nor were they recognized in any manner by the Commissioner of Indian Affairs, and no money was paid to them as a band until Special Agent Leander Clark took a census on May 31, 1866, and found 264, for whom he expended $5,359.06, on account of annuities for the year 1865.

If the appellants have any just rights upon this item of their claim the court is barred from the proper consideration of it for want of competent testimony. (Rec., p. 43.)

It was the plain and unqualified duty of the Indians who had wandered from their reservation in Kansas to return to the agency before the date of the annual payments, and see that their names were enrolled for their *per capita* shares of the annuities. The treaties under which those annuities became due all

provided that the money should be paid to the Sac and Fox tribe of Indians, and the Government in all its treaties under which these annuities became due recognized the defendant Indians only. As was said by Judge Weldon in *Blackfeather* v. *The United States* (37 C. Cls., 233), afterwards affirmed by this court (190 U. S., 368):

> The United States, as guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either expressed or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians.

In the case of the *Eastern Band of Cherokees* v. *The United States* (20 C. Cls., 449; 117 U. S., 288) it was held that—

> Cherokees who remained east of the Mississippi River after the removal of the nation thereby severed their connection with the Cherokee Nation, were not made parties to the Cherokee treaty of 1846, do not form a nation, and are not entitled to participate in the benefits of the fund held by the United States in trust for the whole Cherokee people.

In the case of the *Chickasaw Nation* v. *The United States* (22 C. Cls., 222), where a suit was brought by the nation to recover money belonging to certain orphans of the tribe which had been paid to persons who failed to pay it over to the beneficiaries, the

court said, "but a small portion of the money ever in fact reached the orphans." * * *

> We have no doubt that the orphans were imposed upon and parted with their rights improvidently, but following the line of argument already marked out, we can not hold the United States liable for their sufferings or hardships. The wards of the nation were not the individuals, Im-mi-ah-ho-ka, Viney, or Puck-sha-nubby, but the Chickasaw Nation (p. 264).

This court, in the case of the *United States* v. *Blackfeather* (155 U. S., 180–196), held that:

> The United States is not liable to the Shawnees for moneys paid under a treaty to guardians of orphans of the tribe, appointed by the tribal council, who had embezzled the money when so paid.

In the case of *Journeycake* v. *The Cherokee Nation* (31 C. Cls., 140) the court held that the Cherokee freedmen who failed to return in accordance with the requirements of the treaty of 1866 were not entitled to share in the distribution of the communal fund.

In the most recent case upon this subject, *Pam-to-pee* v. *The United States* (187 U. S., 371–401), there were, according to the findings of the Court of Claims, 272 Pottawatomie Indians who should have been placed upon the census roll and were entitled to share in the payments, but not having presented themselves and caused their names to be placed upon

the roll, were not entitled to recover either from the tribe or the United States. "It must be assumed in the absence of any showing to the contrary that the officers of the Government acted reasonably, fairly, and with all needed diligence in discharging the duty imposed upon them." In its opinion the court further said:

> This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the absolute duty is cast upon the defendant to see that the right party is paid, but a case in which the amount of a fund for distribution was determined and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in the question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.
>
> To what would any other ruling result? The finding which, evidently, from the opinion of Chief Justice Nott was not very clearly established, that 272, in addition to those already paid, were entitled to a part of the fund, does not conclude other claimants, and if these petitioners should obtain a judgment against the United States other petitioners might come forward with like claim, and so the Government be compelled to pay over and over again, although it had made one payment in compliance with the directions of the court. Further, if there were really more beneficiaries entitled to share in this fund than

those who actually received payment, those who were paid received each too much and should return the surplus; and the amount of that surplus would be consistently increased as in successive actions there were added further beneficiaries, for the distribution was, as stated, per capita—a mode of distribution contended for by the petitioners. Petitioners seem to assume that, although the Government took the course prescribed by the court in ascertaining the individuals entitled to share in that fund, it assumed all the risk of mistake, however made, and that they could wait until after the Government had acted and made the distribution, and that no responsiblity rested upon them to furnish evidences of their title. For reasons stated we can not assent to this view (pp. 379, 380).

The Court of Claims in rejecting this item said (Rec., pp. 43, 44):

> Moreover, as these Indians had voluntarily and without the consent of the United States, withdrawn themselves from the reservation which had been provided for them by the Government they were no longer a legal entity; they were simply individual Indians who had willfully separated themselves from their tribe. The jurisdictional act, however, gives them a forum in which to maintain such rights as they may possess. (*Stewart* v. *The United States*, 206 U. S., 185.)
>
> It has been the custom and policy of the Government not to pay to or reserve annuities for Indians who are absent from their res-

ervation without permission, and the wisdom and force of this practice can not be controverted. It was held by this court in the *Blackfeather case* (37 C. Cls., 233, 241), which was affirmed by the Supreme Court (190 U. S., 368), that "The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians, so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

It is clear that inasmuch as the claimant Indians had voluntarily left the Kansas reservation provided by the Secretary of the Interior for the habitat of the tribe, it was their plain and unqualified duty to return to the agency (which it appears that some of them did) prior to the dates of the annual payments and see that their names were enrolled for their individual shares of the annuities, because they must have known that the treaties which provided said funds required payment to be made to the Sac and Fox tribe at their established agency, and not elsewhere.

In the *Journeycake case* (31 C. Cls., 140) it was decided by this court that all Cherokee freedmen who had abandoned their reservation and failed to return were entitled to no part of the tribal funds; and in the more recent case of *Pam-to-pee* v. *The United States* (187 U. S., 371) the same principle is clearly laid down. The trend of the decisions of this court, and of the Supreme Court as well, in

this class of cases is to the effect that it is the duty of the Government to recognize tribes and not individual Indians in paying out annuities or other funds due to its Indian wards.

Considering all the facts which rightfully belong to this particular claim, the different treaties, the laws of Congress, the rulings of the Interior Department, and the decisions of the courts, we can not do otherwise than decide that no allowance can be made to claimants thereon.

Item 2 of the claim.

The second item of the claim is closely related to the first. It is for an alleged balance of annuities claimed to have been withheld from the appellants and paid to the defendant Indians from 1867 to 1899, inclusive.

By article 2 of the treaty of February 18, 1867, *supra*, all of the absent members of the tribe were invited to return and permanently unite with the tribe and participate in the advantages of the treaty. The treaty provided, however:

> That no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties, now due or to become due said na-

> tion, shall be paid them *on their reservation in Kansas;* and after their removal, as provided in this treaty, payments shall be made *at their agency* on their lands as then located.

Congress, however, by an item inserted in the Indian appropriation act of March 2, 1867 (14 Stat., 507), modified this provision of the treaty of 1867, in so far as it related to the absentee members of the tribe in the State of Iowa, and for the first time recognized the existence and right of the Iowa Indians to participate *as a band* in the annuities of the Sac and Fox tribe, and to be paid in Iowa. The item reads as follows:

> For interest on eight hundred thousand dollars, at five per centum, per second article, treaty eleventh October, eighteen hundred and forty-two, forty thousand dollars: *Provided,* That the band of Sacs and Foxes of the Mississippi now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The act, according to a well-recognized rule of statutory construction, must be regarded as prospective. It must further be regarded as an indorsement and ratification of the manner in which the annuities prior to its passage had been disbursed; otherwise the act would have made provision for the payment of accumulated annuities to the Iowa Indians.

The first annuity payment to the Sac and Fox Indians in Iowa under the treaty of February 18, 1867, and act of March 2, 1867, was made in the early part of that year, and the *pro rata* share, according to numbers, was $11,174.66, and payments were made to them at the same rate up to and including the fiscal year 1884. The numbers upon which the annuities were apportioned do not appear.

The Iowa Indians protested against the amount of their annuity and refused to accept it until Congress inserted a provision in the Indian appropriation act of May 17, 1882 (22 Stat., 78), which, after appropriating $51,000 for annuities in three different amounts, provided:

> That the sum of one thousand five hundred dollars of this amount shall be used for the pay of a physician and for purchase of medicine; in all, fifty-one thousand dollars: *And provided further*, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them.

This provision of the act of 1882 was enacted for the express purpose of ratifying and confirming the apportionment of the annuities of the tribe up to that date. It would be absurd to contend that because Congress *prohibited larger payments after* May 17, 1882, the appellant Indians were entitled to *larger payments before* that date. There can be no question as to the motive which actuated Congress in

passing this act. The Iowa Indians were dissatisfied with the amount apportioned to them and refused to receive it. Congress determined to let them know that they would get no greater sum by waiting. After the passage of the act they appeared to have realized that fact and accepted their annuities. (Rec., p. 38.)

The act of 1882 was also intended to ratify and confirm the payment of $1,500 for the support of a physician and the purchase of medicines provided under article 10 of the treaty of 1867, *supra*. This amount was allowed for five years under that treaty. All of which was paid to the tribe proper in Kansas and Oklahoma as provided, but was continued up to 1882 without express authority of law. (Finding 12; Rec., p. 39.) The act of 1882 provided, however, that this amount should be continued and paid in the future, as in the past, *to the tribe proper*, because otherwise a part of it paid to the Iowa Indians *would have increased their annuities* which was prohibited by the act.

There was also deducted from the sum of $51,000 annuities, from 1885, before apportionment between the two branches of the tribe, $10,000 under article 9 of the treaty of 1867, *supra*, of which $5,000 was for school purposes and $5,000 for the support of the tribal government. (Rec., p. 39.) The propriety of this course will be recognized when it is remembered that all of the treaties were made with the tribe proper, which moved from Iowa to Kansas and from Kansas to Oklahoma; and all of the acts of Congress affecting

their tribal property have dealt directly with the tribe proper, and only incidently with the band in Iowa. The act of 1882 ratified this course of the Secretary of the Interior, as well as the payment of the annuities.

Payments were therefore made, as already stated, for the years 1882, 1883, and 1884 at the same rate as had been paid before that time to the Iowa Indians.

After the Iowa Indians had consented to receive their accumulated annuities, and had actually received three additional annual installments, Congress inserted another provision in the Indian appropriation act of July 4, 1884 (23 Stats., 85), where it provided:

> That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior.

Under this act declared *prospective* by the word *hereafter* therein used the Secretary of the Interior caused a census of the original Sac and Fox Indians in Iowa to be taken, and ascertained that there were 317 of them; and from that time, including the fiscal year 1885, they were paid upon that basis for the Iowa band and 513 for the Oklahoma band, except

for the years 1885 and 1886, when the basis for the defendant Indians was 505.

By the terms of the act the Secretary of the Interior was vested with discretion to ascertain the number of original Sac and Fox Indians as a basis for the apportionment of their annuity *in the future*. Having exercised that discretion it is not within the jurisdiction of the courts to review his action. The roll made by him of the Sac and Fox Indians in Iowa is not subject to correction by the courts.

In the recent case of *Kimberlin* v. *Commission to the Five Civilized Tribes* (104 Fed. R., 653), construing section 21 of the act of June 28, 1898 (30 Stat., 495), which delegated authority to the Dawes Commission to make up the Cherokee tribal roll, Judge Sanborn said:

> Under these acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the judicial discretion of the commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled

> rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed (pp. 662, 663).

In the case of *Fleming* v. *McCurtain* (215 U. S., 56) certain individual members of the Choctaw Nation, who had been refused enrollment by the Commission to the Five Civilized Tribes, claimed that they had a vested interest in the Choctaw tribal lands and funds under the provisions of the treaty of September 27, 1830 (7 Stat., 333), and the terms of the patent issued thereunder, which conveyed certain lands described therein to the Choctaw Nation in fee simple to them and their descendants, to inure to them while they should exist as a nation and live thereon. This court held that the lands and funds of the Choctaw Nation were communal lands and funds to which no individual member of the nation had a vested right, but that his participation therein was dependent upon his being alive and upon the Choctaw rolls as a member of the tribe at the time of the dissolution of the tribal government and allotment of the tribal lands and distribution of the tribal funds; and the court refused to review the action of the Dawes Commission in refusing to enroll the individual members of the tribe.

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Even if the Secretary of the Interior had not been vested with discretion by the act of 1884, his construction of the treaties and acts of Congress would have been entitled to great respect by the courts, and should not be overruled without cogent reasons.

The case of *Brown* v. *The United States* (113 U. S., 560) is one of the leading cases upon the subject of contemporaneous and uniform interpretation of the laws by government officials. In the case of *Hewitt* v. *Schultz* (180 U. S., 139), this court held that the continuous contemporaneous construction of the Secretaries of the Interior of the Northern Pacific Railroad act of 1864 was controlling. (See also *United States* v. *Healey*, 160 U. S., 136; and *United States* v. *Sweet*, 189 U. S., 471.)

The Court of Claims, in rejecting this item of the claim, said (Rec., pp. 44, 45):

> The treaty of 1867 provided that thereafter the claimants should share, in proportion to their population, in the annuities allotted to the Sac and Fox tribe, and they were paid their proportion according to an enumeration of the tribe taken at that time, and were so paid annually until 1885. The defendants contend that there can be no relief accorded claimants under this claim for annuities paid prior to 1884, because Congress has stamped with its approval all such annuity payments; nor can there be a recovery for payments made since that date, because the money so paid has been disbursed strictly in accordance with the express provisions of a law enacted in that

year, which gave the Secretary of the Interior discretionary powers in making the roll. (*Kimberlin* v. *Commissioners to the Five Civilized Tribes*, 104 Fed. R., 653.) Besides, the findings are not of a character upon which a judgment could be predicated, even though the legal principles for which claimants contend were well founded.

Under article 6 of the treaty of 1859 (15 Stats., 467) the President and the Congress were given absolute authority to establish a new basis for the distribution of the tribal funds of the Sac and Fox Nation. In the act of May 17, 1882 (22 Stats., 78), it was provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." And the act of July 4, 1884 (23 Stats., 85), further provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their *per capita* proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

Thus it appears that from 1882 to 1885 there could not be paid to claimant band of Indians a greater sum of money annually than they had received prior to that time, which may be construed as a legislative approval of the

manner in which the fund had been distributed previous to that date.

Under the act of 1884, *supra*, the Secretary of the Interior caused a census of the original Sacs and Foxes in Iowa to be taken, which showed their population to be 317, and from that time, including the year 1885, they were paid upon the basis thus determined.

All the facts deducible from the admissible testimony bearing upon this particular claim are carefully set out in the findings. Under the act of March 2, 1895 (28 Stats., 876–903), the Congress directed the Secretary of the Interior to examine the claims of the claimant Indians, and ascertain whether under treaties or acts of Congress any amount is justly due them as a part of the Sac and Fox tribe of Indians of the Mississippi. In pursuance of said act the Secretary of the Interior made an investigation of all of the claims of the Iowa band, as set forth in their memorial to the Congress, which claims are practically the same as are involved in this suit. The investigation was duly made, and a balance of $42,893.25, as heretofore stated, was found to be due them, which amount, as shown by Finding XIII, was promptly paid.

Item 3 of the claim.

The third item of the claim made by the Iowa Indians is for their *pro rata* share, according to numbers, of the annuities of the Sac and Fox Indians of the Mississippi from 1900 to 1907, and is but a continuation of the preceding item of the claim. The argu-

ment and facts applicable to the second item of the claim are equally applicable to this, and were so regarded by the Court of Claims in its opinion, where it said (Rec., p. 45):

> III. The third item, which is set out in paragraph 13 of the amended petition, avers that claimants are entitled to $25,788.85 on account of an alleged unequal apportionment of annuities from 1900 to the time the suit was instituted. This claim is simply a continuation of the second. The two claims should have been considered together as one claim for the whole period of both. What we have said under the head of the second item applies with equal force to this one, and consequently no allowance can be made.

Item 4 of the claim.

The fourth item of the claim is for the accumulated annuity of $500 agreed to be paid by article 4 of the treaty of October 11, 1842, to the principal chiefs of the Sacs and Foxes. The article in question reads as follows:

> It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of $500 annually, *out of the annuities payable to the tribe*, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.

When the Sac and Fox Indians who are residing in Iowa left their reservation without the consent of the Government, it appears that the Fox chief also left the reservation, and that after his departure the $500

annuity provided by the treaty of 1842 was paid to the Fox chief resident with the tribe in Kansas. This was a proper disbursement of the annuity, because article 9 of the treaty of 1867, *supra*, provides that the annuity of $500 shall be paid out of the sum of $5,000 designated by the treaty *for the support of the national government of the tribe*, and was spent *with the approbation of the agent of the tribe.*

This claim is made on the strength of the act of May 31, 1900, *supra*, which directed the Secretary of the Interior—

> to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, *beginning with and including the fiscal year nineteen hundred*, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three. (Italics ours.)

This act appears to have been regarded by the appellants as a recognition by Congress of their right to collect back pay for the annuities of the Fox chiefs from 1862 to 1899, inclusive, amounting to $18,500.

This act, however, was not a recognition of the right of the chiefs of the Iowa band who preceded this chief to back pay, and certainly was not a recognition of *his* legal right to collect it, but rather should be looked upon as an indorsement of the position taken by the department in paying the annuity to the chief of the Fox Indians who remained with his tribe, as it was not granted to him until the death

of the chief elected by the tribe. This construction was given to the act by the Interior Department and should have the same weight as its construction given to the treaties to which we have referred in the preceding claims, and should come within the authorities cited in support of our position as to those claims.

The Court of Claims, in rejecting this item of the claim, said (Rec., pp. 45, 46):

> IV. This is a claim for $500 a year for thirty-seven years' salary of the alleged chief of the claimant Indians. This claim is predicated on article 4 of the treaty of 1842, *supra*, which reads:
>
> "It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." (7 Stats., 596.)
>
> This article is an agreement between the United States on the one part, and the tribe on the other, providing that out of the annuities "payable to the tribe" $500 should be payable to each of the "principal chiefs," but "with the approbation of their agent." Subsequently a portion of the tribe of their own volition separated themselves from the main tribe and were without an agent up to the year 1867. Had an agent in Kansas approved a payment to an alleged chief in the Iowa band, there would even then have been

grave doubt of the legality under this provision to make such payment in view of the separation. If this were allowable, tribes would be rent and there would be no end to the confusion that would follow. While it is true that the act of May 31, 1900 (31 Stats., 245), directed the Secretary of the Interior to pay to the head chief of the Iowa band $500 salary per year, during the remainder of his natural life, *beginning* with the fiscal year of 1900, yet that does not imply that Congress intended that the chiefs who preceded him should also be paid a like salary, thus making the act retroactive. On the contrary, beginning with the fiscal year 1900, the court is prohibited from going back of that date. Much would have to be read into the act to authorize such procedure, and this we are not authorized to do. This is the construction given to the act by the Secretary of the Interior, and under the authorities we have already cited under the first item of the petition we would not be justified in overruling him. Nor is there anything in the special jurisdictional act controlling or that would justify such action. Hence no allowance can be granted under this claim.

Item 5 of the claim.

The fifth item of the claim is for a proportionate share of the funds derived from the lands ceded by the treaty of October 1, 1859, *supra*.

This claim appears to have been presented in the petition in the Court of Claims for the first time, and

even had the appellants a meritorious claim there would be no way in which the court could arrive at the amount which would be due them. It has already been shown that certain members of the tribe left their reservation in Kansas and went to Iowa in 1855, and that other members of the tribe left the reservation in Kansas at different times from 1862 to 1867 and also went to Iowa, but their numbers, ages, names, and sex have not been shown by competent testimony. (Rec., p. 35.) All of the appellants now in Iowa, so far as the record shows, may have returned to Kansas and had their debts paid under the treaty of 1859, as the treaty provided that all absent members should return and receive the benefits of its provisions, otherwise they would not be entitled. It may be well to call the attention of the court also to the fact that there are no funds in the Treasury derived from the cession of land under this treaty, and never were, the money having been used, according to its terms, in the payment of the debts of the Indians.

The construction placed by the Department of the Interior upon the treaty of 1859 is entitled to the same weight as the construction placed upon the other treaties to which we have called the attention of the court, and we would also call the attention of the court to the same authorities which we have already cited in connection with those cases, and particularly to the Pam-to-pee case, which we think conclusive of this, as well as all of the other claims in question.

The Court of Claims rejected this item of the claim as follows (Rec., pp. 46, 47):

> V. The fifth and last item of the claim, which is contained in the fifteenth paragraph of the amended petition, relates to a share in a fund for land disposed of by the Sac and Fox tribe pursuant to the treaty of 1859, *supra*, and interest on the amount which may be found due and payable to the claimant Indians. We can find no line of competent testimony in the record to justify this contention. This claim was never presented to the Interior Department, and even if it were a proper claim against the defendants and was sustained by competent proof, we can see no way by which the court could arrive at the amount which might be due and render a judgment therefor. Furthermore, it is contended by defendant's counsel that there are not now and never were any funds in the Treasury derived from the cession of these lands, the money having been used according to the terms of the treaty in the payment of the debts of the Sac and Fox tribe of Indians. The treaty provided that all Indians absent from the tribe might return and participate in the benefits of its provisions. There is no competent proof in the record to enlighten the court as to the number of Indians who abandoned the tribe from 1855 to 1867, or how many returned during that period and participated in the distribution of the tribal funds, or how many finally returned to the Oklahoma reservation and thereafter became permanent members of the tribe. In the ab-

sence of proof to the contrary, it is only just to assume that those who did not return to the tribe until 1862 shared in the benefits of the treaty of 1859, and as no proper effort has been made by claimants to show who the Indians were that had returned to Iowa prior to 1859, and what, if any, relationship, legal or otherwise, they bear to the claimants in this case, no allowance can be made.

Furthermore, the Supreme Court has decided that there is no vested interest in unallotted tribal lands and undistributed tribal funds. As was said in the case of *Stephens* v. *The Cherokee Nation* (174 U. S., 445), " * * * the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." The same principle was laid down in *Wallace* v. *Adams* (143 Fed. R., 716), which was subsequently affirmed by the Supreme Court (204 U. S., 415).

From what we have said above there can be no allowance to claimants on this branch of the case.

Under the arguments and facts as stated in this brief we submit that the judgment of the Court of Claims should be affirmed.

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